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No. 06-137

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SUPREME COURT, U.S.

In the Supreme Court of the United States

CRAIG MICHAEL HASKELL,
Petitioner,

v.

STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Michigan

BRIEF IN OPPOSITION

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September 22, 2006

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Was Petitioner sentenced to a longer term of imprisonment based on a claim of innocence?

II. Does Michigan's statute defining a "continuing pattern of criminal behavior" violate due process?

III. Where the statutory maximum sentence is not impacted by the sentencing guidelines, does Michigan's scheme of indeterminate sentencing violate the Sixth Amendment?

IV. Does Michigan's standard requiring an evidentiary hearing on an ineffective assistance of counsel challenge only where there is a disputed question of fact violate the Constitution?

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of facts trivializes the violence of the sexual assault on the victim.

Petitioner and the victim dated in high school over a two year period. (186).[1] While attending different colleges, they broke up in the fall of 2001. (187). Until May 2002, the only contact between them was through online instant messaging. (187). Late one Sunday night in May 2002, Petitioner came over to see the victim and Petitioner said he wanted to get back together. The victim did not wish to do so, and described it as "a long, frustrating talk." (188-189). The night of Thursday, May 17, 2002, Petitioner went to the victim's house and they watched a movie. During the movie, Petitioner started talking about killing himself. He cried and said that he was going to call the victim's dad and tell him horrible things and do other things to try to get her to be close to him. The victim told Petitioner that "he had to leave because it was scary." (192). Petitioner refused to leave and continued saying mean things to the victim. (193).

Petitioner then told the victim that if she changed into her pajamas, she would be more comfortable and then he would leave. (193-194). While Petitioner went to the bathroom, the victim went into her basement bedroom to change. (194). Petitioner then came into her room, sat down on the bed, said that he had made his "final decision," and when she asked him what that was, he punched her in the left eye with his fist

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[1] Parenthetical references in this section are to page numbers of volume I of the jury trial transcript. Page references to other volumes of the transcript are prefaced by the applicable roman numeral.

with such force that he knocked her off the bed. She tried to run for the door, but Petitioner jumped on top of her and hit her in the head and slammed her head against a dresser. (196-197). Petitioner then put his hands around her throat and reached his hands down her throat, "like he was trying to reach into my stomach." (197). As he was on top of her, Petitioner threatened to go upstairs and kill her family if she made any sound. Petitioner told the victim that he wanted her to put on her pajamas so it would be easier to have sex with her "one more time" and that he was going to kill himself. (197-198). She tried to get away, but Petitioner continued to hit her so much that she became dizzy and could not see straight. She laid down and Petitioner took off all her clothes and touched her breasts and vaginal area. (198-199). He lamented that she wouldn't date him because he always loved her, called her a "whore" and accused her of sleeping with "every guy at school." (199). Petitioner then penetrated her digitally twice, forced sexual intercourse, and digitally penetrated her again afterwards. (199-201). Petitioner then grabbed a pair of scissors which had been lying on the bed. He held them, but did not do anything with the scissors to the victim. (202). Afterwards, Petitioner repeatedly said he was sorry, and asked her to wait until the morning to tell her parents. (203-204).

A jury found Petitioner guilty but mentally ill of four counts of first degree criminal sexual conduct,[2] one count of second degree criminal sexual conduct,[3] and one count of misdemeanor aggravated domestic violence. He was acquitted

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[2] Contrary to Mich. Comp. Laws § 750.520b.

[3] Contrary to Mich. Comp. Laws § 750.520c.

of a charge of assault with a dangerous weapon alleging a threat with the scissors.

At sentencing, the trial court scored guidelines as required by Mich. Comp. Laws § 769.34.[4] Contrary to Petitioner's statement, the guidelines are not "enhancements" utilized to "increase ... the sentence above the statutory minimum prescribed by Michigan law."[5] Rather, Michigan's sentencing scheme involves two parts to a sentence, a minimum and a maximum. The minimum sentence is calculated using the guidelines and results in a range of months within which the court sets the minimum sentence. Under Michigan's sentencing guidelines, points are scored based on a defendant's prior criminal record ("prior record variables") and based on the facts of the offense ("offense variables"). The resulting points for the prior record variables and the offense variables are then applied to find a specific grid on a table. The grid represents a period of time in months within which the minimum sentence of an indeterminate sentence should fall, absent a departure. Petitioner's grid for the minimum sentence was 108 to 180 months.[6] The court may

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[4] The version of the statute in effect at the time of Petitioner's sentencing is contained in the Appendix and is the version to which reference is made. It has been subsequently amended in a manner not germane to this petition.

[5] Pet. at 6.

[6] First degree criminal sexual conduct is non-probationable. Mich. Comp. Laws § 771.1(1). Although not relevant to Petitioner's claim, for those offenses which are probationable, the guidelines provide that certain grids require an "intermediate sanction" which includes probation, Mich. Comp. Laws § 769.31(b). Depending on the scoring of the guidelines, the grid

depart from the recommended minimum sentence range upward or downward based on substantial and compelling reasons. The maximum sentence is set by statute and the court is required to impose that maximum. Mich. Comp. Laws § 769.8(1). For example, the maximum sentence for second degree criminal sexual conduct is fifteen years. Mich. Comp. Laws § 750.520c(2). For an offense punishable by life in prison, such as first degree criminal sexual conduct, the maximum is a term of years set by the court and is unaffected by the guidelines.

During his sentencing, Petitioner disputed the factual basis for the scoring of the offense variables but did not raise any objection to judicial factfinding or to any other constitutional deficiency to Michigan's sentencing guidelines. On the four counts of first degree criminal sexual conduct, the trial court sentenced Petitioner to four concurrent terms in the Michigan Department of Corrections for a minimum, within the applicable guidelines grid, of twelve years (144 months) to a maximum of thirty years. Pet. App. at 46-47. Petitioner was also sentenced to a minimum term of ten years to a maximum of fifteen years on the conviction for second degree criminal sexual conduct.[7] *Id.*

During the pendency of Petitioner's appeal to the Michigan Court of Appeals, Petitioner filed a motion pursuant to Mich. Ct. R. 7.211(C) seeking a remand to the trial court to conduct an evidentiary hearing regarding Petitioner's

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may be a cell for which a sentence can either be an intermediate sanction or an indeterminate prison sentence. Mich. Comp. Laws § 769.34(4)(d).

[7] Under Michigan law, no guidelines were scored for the lesser second degree criminal sexual conduct conviction.

allegations of ineffective assistance of counsel. By order dated September 1, 2004, the Court of Appeals denied Petitioner's motion for "failure to persuade the Court of the necessity of a remand at this time." *See* App. at 2b. From that order, Petitioner filed a timely application for leave to appeal with the Michigan Supreme Court. On May 31, 2005, the Michigan Supreme Court denied Petitioner's application. *See People v. Haskell*, 472 Mich. 913; 697 N.W.2d 152 (2005); App. at 1b. Petitioner never sought further review of that issue.

The Court of Appeals subsequently affirmed Petitioner's conviction and sentence in an unpublished opinion. Pet. App. at 1-16. The Michigan Supreme Court denied Petitioner's application for leave to appeal. *People v. Haskell*, 474 Mich. 1118; 712 N.W.2d 448 (2006); Pet. App. at 17.

REASONS FOR DENYING THE PETITION

I. Petitioner was not subjected to a longer sentence based on his claim of innocence at sentencing. Petitioner conceded he showed no remorse and never claimed that an assertion of innocence cannot, as a matter of law, be considered as evidence of a lack of remorse.

Petitioner frames the question presented very specifically: can a court consider a defendant's expression of innocence as evidence of a lack of remorse. Petitioner, however, failed to present that question to the intermediate state court of appeals or the state supreme court. In the lower courts, Petitioner always framed the question as whether the trial court had improperly held out the *quid pro quo* of a lower sentence in exchange for a confession of guilt as prohibited by Michigan law. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 10. Accordingly, the question presented is

unpreserved. Petitioner's failure to preserve the question has deprived this Court of a close factual examination of the sentencing proceeding by the lower courts to determine whether the only evidence that existed to support the trial court's finding of a lack of remorse was Petitioner's claim of innocence, and if so, whether such a procedure would be a violation of Petitioner's state or federal constitutional protections.

Petitioner's allocution to the court was unequivocal in his assertion of innocence, with no reference to his mental illness or the injuries suffered by the victim, as he referenced Plato and commented that truth and justice do not exist on Earth. Pet. App. at 39. The court asked no questions of Petitioner and made no initial comment about Petitioner's allocution. Instead, the trial court heard argument from the attorneys over Petitioner's motion to vacate some of the convictions. Pet. App. at 39-41. Only later, the trial court observed, "Now you may protest your, your innocence but that's a fact that unless a higher Court sets aside this verdict somehow, it's something that somehow you are going to have to accept." Pet. App. at 42. When the court went on to tell Petitioner, "It's about you raping her," Petitioner volunteered, almost defiantly, "No it's not." Petitioner's counsel explained Petitioner's attitude, clarifying at length that because of his mental illness Petitioner did not believe himself capable of the acts of sexual violence of which he was convicted. Pet. App. at 43-46.

The trial court expressed its concern over the absolute lack of remorse in this case.[8] During trial, Petitioner argued that

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[8] Even the probation officer commented on Petitioner's lack of remorse in the presentence report: "...while he stated he felt

"[i]t was a domestic violence, domestic assault." (Tr. III at 233). At sentencing, Petitioner's counsel even acknowledged that Petitioner had seen that the victim was physically assaulted and that he had "obviously" known what he did to the victim and that Petitioner could not deny the physical assault. Pet. App. at 45. In the context of his claim of innocence, Petitioner demonstrated a lack of remorse by his complete failure to even acknowledge his mental condition as a mitigating factor or that the victim was even harmed. Instead of expressing some remorse for his victim and her plight, from Petitioner there was only defiance. In fact, in Petitioner's appeal to the state court of appeals, Petitioner conceded that he expressed no remorse. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 11.

Although Petitioner maintained his innocence, at no time did the court try to get Petitioner to admit his guilt. In fact, the court did not direct any questions whatsoever at Petitioner, much less attempt to try to get him to confess. There was no argument by the court or even an invitation by the court for a response. Instead, Petitioner *interrupted* the court while it was articulating its analysis of its sentencing considerations. Even after being interrupted, the court did not engage Petitioner or seek a response or a confession.

Furthermore, the court did not suggest in any way that the sentence would have been less if Petitioner *had* confessed. Petitioner claims that the court suggested it would impose a lower sentence if Petitioner confessed based on the trial court's reference to a possible lesser sentence under an earlier

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remorse, no true remorse was displayed." Presentence Report at 2 (Evaluation and Plan).

plea agreement. Taken in context, the comment does not suggest a *quid pro quo* of a lower sentence in exchange for a confession, but rather reflects the trial court's obvious concern at the prospect of sentencing a young man to such a lengthy prison term. Pet. App. at 41-43.

In this case, Petitioner is attempting to convert a common and fact-intensive inquiry into a broad legal question worthy of certiorari by suggesting that the Michigan courts are applying a novel and unconstitutional standard. Michigan's standard is well-settled. Resentencing is required where a trial court considers the defendant's failure to admit guilt. *People v. Conley*, 270 Mich. App. 301, 314; 715 N.W.2d 377 (2006). In order to determine whether a trial court has sentenced a defendant based on his claim of innocence, appellate courts review three factors: "(1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe." *People v. Wesley*, 428 Mich. 708, 713; 411 N.W.2d 159 (1987).[9] But, lack of remorse is clearly an appropriate consideration for sentencing. *Id.* at 711. When presented with the opportunity to directly review *Wesley*, this Court denied the petition for certiorari. *Wesley v. Michigan*, 484 U.S. 967; 108 S.Ct. 459; 98 L.Ed.2d 399 (1987).

Contrary to Petitioner's claim, the Michigan standard is consistent with how other courts treat a claim of innocence at

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[9] Although this test was articulated in a plurality opinion, it has been followed by the intermediate court of appeals. *See, e.g., People v. Calabro*, 166 Mich. App. 389, 394-395; 419 N.W.2d 791 (1988).

sentencing. The "flat out split among the courts in this country" claimed by Petitioner simply does not exist. The cases cited by Petitioner illustrate this point. In *United States v. Wright*, 533 F.2d 214 (5th Cir. 1976), the court of appeals vacated a sentence based on comments by the trial judge that established that the defendant was being punished for having a trial. Nothing in that case involved whether a claim of innocence was used as evidence of a lack of remorse. In *United States v. Roe*, 670 F.2d 956 (11th Cir. 1982), while nothing in that case addressed a claim of innocence being considered as evidence of a lack of remorse, the statement quoted by Petitioner from that case,[10] "that a '[s]entencing court may not present the defendant with a choice between admitting his guilt and enduring a harsher sentence for failing to do so,'" is an accurate restatement of Michigan law. In *United States v. Laca*, 499 F.2d 922 (5th Cir. 1974), the trial court imposed a greater sentence because the defendants failed to confess. Again, nothing in the opinion discusses a lack of remorse. Citing *Geraci v. Senkowski*, 211 F.3d 6 (2d Cir. 2000), Petitioner suggests that the Second Circuit differs from Michigan. Yet the lower court, which was affirmed by the Second Circuit, explicitly stated, "A sentencing judge may properly consider a defendant's remorse, or lack thereof, in determining a defendant's sentence. Doing so does not infringe a defendant's Fifth Amendment rights." *Geraci v. Senkowski*, 23 F. Supp.2d 246, 266-268 (E.D.N.Y. 1998). Again, this is a simple restatement of the same standard followed in Michigan.

Even the opinion of the Montana Supreme Court, cited by Petitioner as evidence of a conflict among the lower courts, does not go as far as Petitioner asserts. In *State v. Imlay*, 249

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[10] Pet. at 8-9.

Mont. 82; 813 P.2d 979 (1991), the Montana Supreme Court held that it was improper to revoke a defendant's suspended sentence based solely on a refusal to admit guilt. Remorse, or the lack thereof, was not an issue in that case. In fact, Montana acknowledged Michigan's standard in *State v. Shreves*, 313 Mont. 262; 60 P.3d 991 (2002), that "a court may consider lack of remorse as basis for a sentence, but may not punish a defendant for refusing to admit guilt." *Id.* at 260, citing *Wesley*. Acknowledging that it was difficult to distinguish between punishing a defendant for remaining silent and failing to show remorse, the Montana Supreme Court concluded it was unable to make such a distinction in the case before it. *Id.* Accordingly, the court held as a matter of both federal and *state* constitutional law, that a sentencing court could not draw an inference of a lack of remorse from a defendant's silence at sentencing where he has maintained innocence. *Id.* at 260-261. That Montana has chosen, as a matter of construing its own state constitution, to construe the state protection against self incrimination broader than other states and federal courts construing the Fifth Amendment does not create a conflict making the issue worthy of certiorari.

In an attempt to create a conflict where none exists, Petitioner claims that Michigan permits a court to enhance a sentence based on a defendant's claim of innocence as the Ninth Circuit apparently does, citing *Williams v. Stewart*, 441 F.3d 1030 (9th Cir. 2006). But Michigan law permits no such thing. To the extent that the Ninth Circuit may do so, if the Court wishes to address the issue, then perhaps the Court might grant the petition in *that* case. *See Williams v. Stewart*, No. 06-6249 (petition for certiorari filed August 28, 2006). Even if the Ninth Circuit permits consideration of a claim of innocence at sentencing, that presents no reason to review Michigan's stricter standard.

Almost uni[illegible]ly, courts are precluded from enhancing a sentence based on a defendant's claim of innocence and Michigan's rule is consistent with that principle. But a defendant's lack of remorse is a proper sentencing factor and is directly related to a defendant's capacity for rehabilitation.[11] While there sometimes can be a fine line between taking into account a lack of remorse and punishing a defendant for claiming innocence, the trial court did not cross that line here. *See, e.g., State v. Kamana'o*, 103 Hawaii 315, 321; 82 P.3d 401 (2003)(there is a "subtle, yet meaningful, distinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse, on the one hand, and punishing a defendant for his or her refusal to admit guilt, on the other.") In this case, the state court followed a common rule of law. At best, Petitioner can only claim a misapplication of a properly stated rule of law. In any event, Petitioner's case is fact intensive, unremarkable, and fails to present the issue that Petitioner now seeks to assert for the first time.

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[11] Although the trial court in this case never specifically articulated its concern that the lack of remorse reflected poorly on Petitioner's potential for rehabilitation, the connection is a common sense one, well-known among the legal community, especially for sex offenders. *See, e.g. McKune v. Lile*, 536 U.S. 24, 32-34; 122 S.Ct. 2017; 153 L.Ed.2d 47 (2002)(acceptance of responsibility is an important component of rehabilitation and reducing recidivism); *Wesley*, 428 Mich. at 715-716.

II. The phrase "continuing pattern of criminal behavior" is a term defined by the Michigan Legislature. While Petitioner claimed at sentencing that the statutory definition had not been satisfied, Petitioner never challenged at any stage of this proceeding that the statute violates due process. Because the guideline variable was scored for conduct resulting in convictions, Petitioner fails to state a claim under *Blakely v Washington*.

For the first time, Petitioner claims that Mich. Comp. Laws § 777.43 violates due process.[12] At the time of Petitioner's crime, the statute provided:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offense was part of a pattern of felonious criminal activity involving 3 or more sexual

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[12] Petitioner suggests in a footnote that this could also present a violation of the multiple punishment prong of the double jeopardy clause. Pet. at 14. But the double jeopardy clause does not act as a restraint on the legislature from permitting the separate punishment for multiple acts in the same transaction. *Ohio v. Johnson*, 467 U.S. 493, 499; 104 S.Ct. 2536; 81 L.Ed.2d 425 (1984). In this case, Petitioner sexually penetrated the victim twice digitally, forced sexual intercourse, and then digitally penetrated her again afterwards. (199-201). Each of these four penetrations resulted in a separate conviction as permitted by Michigan law. *People v. Dowdy*, 148 Mich. App. 517, 521; 384 N.W.2d 820 (1986).

penetrations against a person or persons less than 13 years of age. 50 points

(b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person. 25 points

(c) The offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property. 10 points

(d) The offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. 10 points

(e) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against property. 5 points

(f) No pattern of felonious criminal activity existed. 0 points

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

(b) The presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably

inferred from the facts surrounding the sentencing offense.

(c) Except for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12.

(d) Score 50 points only if the sentencing offense is first degree criminal sexual conduct.

At sentencing, Petitioner objected to the scoring of offense variable thirteen. His objection was specific: "I believe there is no pattern of felonious, criminal activities. I believe that there was only the two acts, not the three acts, one being the Criminal Sexual Conduct and the other act being the Domestic Violence. Therefore I would object to the scoring of that at twenty-five." Pet. App. at 28. In response, the prosecutor pointed out that Petitioner was convicted of four separate criminal sexual penetrations. Pet. App. at 28-29. No objection was made that the variable was so arbitrary or rare that it violated due process nor that the scoring of the variable improperly deprived Petitioner of his right to a jury determination of the issue. In addition, no such objection was made in Petitioner's appeal to the intermediate court of appeals or the Michigan Supreme Court. The only issue raised regarding offense variable thirteen on appeal was that the trial court had committed an error in its construction of the Michigan statute. *See* Defendant/Appellant's Brief to the Michigan Court of Appeals at 13-16; Defendant/Appellant's Corrected Application for Leave to Appeal to the Michigan Supreme Court at 8-9. No due process violation or error under *Blakely v. Washington*, 542 U.S. 296; 124 S.Ct. 2531; 159 L.Ed.2d 403 (2004) was alleged. Accordingly, those claims are unpreserved.

Petitioner claims this unpreserved objection is worthy of certiorari based on a conflict among the courts as to what constitutes a "continuing pattern of criminal activity." Pet. at 13. But Petitioner fails to appreciate that the term is a defined one under state law. While subsection 1 describes the variable as "continuing pattern of criminal behavior," subsection 2 requires that "all crimes within a 5-year period, including the sentencing offense, shall be counted." As construed by the Michigan Supreme Court, the phrase is a defined term. *People v. Francisco*, 474 Mich. 82, 87; 711 N.W.2d 44 (2006)("MCL 777.43(2)(a) defines a "pattern" as three or more crimes committed "within a five-year period, including the sentencing offense....") Petitioner, however, confuses this defined term under Michigan law with the undefined one open to judicial construction used in other jurisdictions. Petitioner does nothing to demonstrate that the Michigan statute offends due process other than say so.

Finally, in an attempt to implicate *Blakely*, Petitioner claims a violation of the Sixth Amendment arising from the supposed lack of a jury determination as to whether there was a continuing pattern of criminal activity. Aside from the inapplicability of *Blakely* to Michigan's scheme of indeterminate sentencing,[13] as well as the complete lack of any preservation of the issue in the courts below, Petitioner enjoyed a jury determination as to whether he had committed three or more crimes against a person. In this case, the jury found Petitioner guilty of four separate counts of first degree criminal sexual conduct on which the scoring of offense variable thirteen was based.

Petitioner has failed to demonstrate that the choice of the

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[13] As discussed *infra*, part III.

Michigan Legislature in its definition of a continuing pattern of criminal behavior violates due process. The issue is not worthy of certiorari.

III. Because the guidelines have no impact on the statutory maximum sentence, Michigan's scheme of indeterminate sentencing does not violate *Blakely v. Washington*. In any event, Petitioner submitted to judicial factfinding.

Petitioner displays a fundamental misunderstanding of Michigan's indeterminate sentencing scheme. Contrary to Petitioner's claim,[14] the legislature does *not* prescribe a minimum sentence which is then increased based on judicially found facts. To the contrary, a sentence in Michigan includes both a minimum and maximum term. The maximum sentence is set by statute and the court is *required* to impose that maximum. Mich. Comp. Laws § 769.8(1).[15] In cases where the crime is punishable by life imprisonment, which includes

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[14] Pet. at 16, 20.

[15] The statute provides: "When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence."

first degree criminal sexual conduct,[16] the court has complete discretion over the maximum sentence:

> In all cases where the maximum sentence in the discretion of the court may be ir prisonment for life or any number or term of years, the court may impose a sentence for life or may impose a sentence for any term of years. If the sentence imposed by the court is for any term of years, the court shall fix both the minimum and the maximum of that sentence in terms of years or fraction thereof, and sentences so imposed shall be considered indeterminate sentences. The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.

Mich. Comp. Laws § 769.9(2).[17] The minimum, however, is set by the court and must be within a sentence range prescribed by the sentencing guidelines. Mich. Comp. Laws § 769.34(2).[18] But the minimum sentence does not mean that

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[16] Mich. Comp. Laws § 750.520b(2)("Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or any term of years.")

[17] There appear to be *no* Michigan cases challenging the maximum of an indeterminate sentence. Accordingly, not only are the guidelines irrelevant to the maximum sentence as a matter of law, as a matter of practice, the trial court's discretion in choosing a maximum sentence is virtually unreviewable.

[18] While Mich. Comp. Laws § 769.34(2)(b) provides that the longest a minimum sentence may be is two-thirds of the maximum ("The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence."),

a prisoner is released once that minimum is served. It only means that a prisoner is eligible for consideration by the parole board for release. *See* Mich. Comp. Laws § 791.232 *et seq*. But thousands of prisoners serve sentences well beyond their minimums and many serve their maximum sentences.[19]

As a preliminary matter, Petitioner failed to preserve this claim at sentencing. At sentencing, Petitioner objected to the scoring of four offense variables. Although *Blakely* had not been decided at the time of his sentencing, at no time did Petitioner claim, as a basis for his objections, that it was improper to score the guidelines based on judicial findings of fact. To the contrary, Petitioner submitted himself to judicial factfinding and was an active participant in the process. Pet. App. at 24-29. By his conduct, Petitioner consented to judicial factfinding.[20] Petitioner has thus waived any *Blakely* claim. Accordingly, there is no error to review. *United States v. Olano*, 507 U.S. 725, 732-733; 113 S.Ct. 1770;

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that restriction does not apply to life offenses. *People v. Powe*, 469 Mich. 1032; 679 N.W.2d 67 (2004). Petitioner was convicted of four life offenses.

[19] According to the Michigan Department of Corrections Office of Research and Planning, in 2005, 15.8% of prisoners released were discharged on their maximum sentence. Of the total prisoner population in 2005, 34.4% were serving sentences beyond their earliest release date and of that group, 76% had not been paroled (the remaining 24% were parolees returned to prison as violators).

[20] *Blakely*, 542 U.S. at 310 (States may continue judicial factfinding if defendant consents).

123 L.Ed.2d 508 (1993)("Deviation from a legal rule is error unless the rule has been waived.").

Aside from Petitioner's waiver of any apparent *Blakely* protections, this Court's statements in *Blakely* make it clear that it does not apply to indeterminate sentencing schemes:

> Indeterminate sentencing does not [infringe on the province of the jury]. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is entitled to no more than a 10-year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 309. In this case, every rapist in Michigan who commits first degree criminal sexual conduct knows he is risking the rest of his life in prison. Petitioner's jury made all the findings necessary for a sentencing court to impose a maximum sentence of *any* term of years. While the application of the sentencing guidelines sets the minimum

sentence a defendant must serve before the parole board can consider whether to grant parole or not under Mich. Comp. Law § 791.234(1),[21] that minimum sentence does not dictate when a defendant will be released. Unlike the Washington scheme of determinate sentencing in *Blakely*, release in Michigan occurs only through the parole board, unconstrained by *Blakely*, or upon the expiration of the maximum sentence. *See People v. Drohan*, 475 Mich. 140; 715 N.W.2d 778 (2006)(holding that *Blakely* does not apply to Michigan's scheme of indeterminate sentencing), *petition for certiorari filed*, September 6, 2006, No. 06-6493. *See also People v. McCuller*, 475 Mich. 176; 715 N.W.2d 798 (2006), *petition for certiorari filed*, September 11, 2006, No. 06-6468.

Michigan's sentencing guidelines are more analogous to the scheme approved by this Court in *McMillan v Pennsylvania*, 477 U.S. 79; 106 S.Ct. 2411; 91 L.Ed.2d 67 (1986). In *McMillan*, Pennsylvania provided that a mandatory minimum sentence of five years must be imposed if the sentencing judge found during sentencing that a firearm was visibly possessed during the commission of the offense. The maximum term of the indeterminate sentence, however, was not increased. *Id.* at 81-83. This Court affirmed the statutory scheme finding that "[i]t simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the precise weight to be given that factor." *Id.* at 89-90. In *Blakely*, this Court explicitly distinguished *McMillan* observing that it "involved a sentencing scheme that imposed a statutory *minimum* if a

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[21] Decisions *not* to grant parole are unreviewable. *Morales v. Michigan Parole Board*, 260 Mich. App. 29, 35-36; 676 N.W.2d 221 (2004); Mich. Comp. Laws § 791.234; Mich. Ct. R. 7.104(D).

judge found a particular fact." *Blakely*, 542 U.S. at 304 (emphasis in original). Unlike *Blakely*, the Pennsylvania scheme did "not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*, citing *McMillan*. This is no different than what Michigan does with its sentencing guidelines. The guidelines simply take factors arising from the facts of the offense, a traditional sentencing consideration, and assigns a certain weight to be given those factors.[22] In fact, the guidelines are not even the *exclusive* factors for the court to consider in determining the minimum term of an indeterminate sentence. If the sentencing court finds that certain factors are not covered by the guidelines, or are given inadequate weight, so long as those factors are objective and verifiable, the sentencing court is free to depart upwards or downwards. Mich. Comp. Laws § 769.34(3)(b); *People v. Babcock*, 469 Mich. 247; 271-274; 666 N.W.2d 231 (2003)(appendix prepared by Michigan Supreme Court to

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[22] The following offense variables are required by Mich. Comp. Laws § 777.22(1) to be scored for first degree criminal sexual conduct: aggravated use of a weapon, Mich. Comp. Laws § 777.31; lethal potential of weapon possessed or used, Mich. Comp. Laws § 777.32; degree of physical injury to a person, Mich. Comp. Laws § 777.33; degree of psychological injury to a victim, Mich. Comp. Laws § 777.34; aggravated physical abuse, Mich. Comp. Laws § 777.37; victim asportation or captivity, Mich. Comp. Laws § 777.38; number of victims, Mich. Comp. Laws § 777.39; exploitation of a vulnerable victim, Mich. Comp. Laws § 777.40; criminal sexual penetration, Mich. Comp. Laws § 777.41; contemporaneous felonious criminal acts, Mich. Comp. Laws § 777.42; continuing pattern of criminal behavior, Mich. Comp. Laws § 777.43; offender's role, Mich. Comp. Laws § 777.44; threat to security or interference with the administration of justice, Mich. Comp. Laws § 777.49; and terrorism, Mich. Comp. Laws § 777.49a.

assist the bench and bar in carrying out their responsibilities under Michigan's sentencing guidelines).

As part of his *Blakely* challenge, Petitioner suggests that the error in Michigan's system is that the trial court was permitted to score the guidelines in apparent disregard of Petitioner's acquittal for assault with a dangerous weapon. But Petitioner does not challenge or question this Court's decision in *United States v Watts*, 519 U.S. 148; 117 S.Ct. 633; 136 L.Ed.2d 554 (1997) that a sentencing court may consider conduct for which a defendant has been acquitted. In any event, assuming a lack of merit to any *Blakely* challenge, Petitioner's acquittal of *using* a weapon to assault the victim[23] was not a finding that Petitioner did not *possess* a weapon. Under the guidelines, points could be scored where Petitioner simply "*possessed* ... a ... cutting or stabbing weapon." Mich. Comp. Laws § 777.32(1)(emphasis added). A conviction under the statute requires actual use of a weapon to threaten someone; scoring under the guidelines is sufficient if there is mere possession of a weapon.

Finally, in an attempt to make this case appear worthy of certiorari, Petitioner claims a conflict among the lower courts reviewing sentencing systems he claims are like Michigan's.[24] But none of those states have sentencing systems like Michigan. Six of the seven States cited by Petitioner[25] involve *determinate* sentencing schemes that differ dramatically from the Michigan scheme of indeterminate sentencing. *State v. Brown*, 209 Ariz. 200; 99 P.3d 15, 18 (2004)(defendant given

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[23] Contrary to Mich. Comp. Laws § 750.82(1).

[24] Pet. at 19.

[25] Pet. at 19.

a determinate sentence); *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005)(determinate sentencing scheme in Colorado was not invalidated by *Blakely* because court can only aggravate a sentence based on facts found by a jury, facts admitted by a defendant, facts found after defendant consents to judicial factfinding, or facts regarding prior convictions); *Smylie v. State*, 823 N.E.2d 679, 682-685 (Ind. 2005)(departure from fixed presumptive sentence based on judicial factfinding violates *Blakely*); *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005)(determinate sentencing scheme violates *Blakely* where departures from presumptive sentence permitted based on judicial factfinding); *State v. Natale*, 184 N.J. 458, 483-484; 878 A.2d 724 (2005)(departing from fixed presumptive sentence based on judicial factfinding violates *Blakely*); *State v. Dilts*, 337 Or. 645, 649-652; 103 P.3d 95, 99 (2004)(upward departure from determinate sentence violates *Blakely*). While the seventh state, North Carolina, provides for indeterminate sentencing, both the minimum *and* maximum sentence is determined by judicial factfinding pursuant to the North Carolina guidelines, N.C. Gen. Stat. 15A-1340.17 (d),(e)(2003). *State v. Allen*, 359 N.C. 425; 615 S.E.2d 256, 264-265 (2005)(increase over presumptive minimum and maximum sentence based on judicial factfinding violates *Blakely*). Unlike North Carolina, in Michigan the maximum sentence is unaffected by the guidelines.

Petitioner further identifies three States which he claims permit judicial factfinding and thus create a conflict that this Court must resolve. But none of those schemes are similar to Michigan's indeterminate sentencing system. While California has adopted a determinate sentencing system, it claims that it does not violate *Blakely*. *People v Black*, 35 Cal.4th 1238; 113 P.3d 534 (2005). That issue, however, is the subject of *Cunningham v California*, No. 05-6551, *certiorari granted*, 126 S.Ct. 1329 (2006). Even Petitioner

concedes that *Cunningham* has no impact on whether Michigan's indeterminate sentencing scheme violates *Blakely*. Pet. at 20. Nor do the sentencing systems in the two other States identified by Petitioner bear any relationship to Michigan's system. In *State v Maugaotega*, 107 Hawaii 399, 407-410; 114 P.3d 905 (2005), the Supreme Court of Hawaii rejected a challenge to a sentence under Hawaii's sentencing structure based on *Blakely* because its guidelines were not mandatory.[26] In *State v Gomez*, 163 S.W.3d 632 (Tenn. 2005), the Tennessee Supreme Court found that Tennessee's determinate sentencing scheme does not violate *Blakely* despite the fact that an increase in a presumptive sentence can be based on judicial factfinding. But that finding does nothing to call into question Michigan's indeterminate sentencing system, nor does it create any conflict over how Michigan's sentencing guidelines operate. To the extent *Gomez* raises questions under *Blakely*, then this Court can consider those questions in the context of *that* case. *Gomez v. Tennessee*, No. 05-296 (petition for certiorari filed August 15, 2005).

Given Petitioner's submission to judicial factfinding and *Blakely*'s recognition that indeterminate sentencing schemes do not violate the Sixth Amendment right to jury trial, the petition should be denied.

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[26] Judicial findings of non-binding, advisory enhancement facts do not violate *Blakely*. *United States v. Booker*, 543 U.S. 220, 245-246; 125 S.Ct. 738; 160 L.Ed. 621 (2005)(federal sentencing guidelines rendered advisory to comply with *Blakely*).

IV. Petitioner fails to allege or demonstrate how Michigan's standard for requiring an evidentiary hearing on an ineffective assistance of counsel challenge is the subject of dispute among the lower courts or violates the Constitution.

While his appeal was pending in the Michigan Court of Appeals, Petitioner filed a motion to remand to the trial court to conduct an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel. The court of appeals denied the motion, finding that Petitioner had failed to persuade the court of a necessity of a remand at that time as required by Mich. Ct. R. 7.211(C)(a).[27] App at 2b. Petitioner then sought interlocutory review by the Michigan Supreme Court which was denied. App. at 1b. After the Michigan Court of Appeals issued its opinion, Petitioner then sought review by the Michigan Supreme Court. But nowhere in his application to that court did Petitioner ever allege any error by the court of appeals in denying his motion to remand to conduct an evidentiary hearing. Accordingly, Petitioner's claim is not preserved for review by this Court.

Michigan requires that an evidentiary hearing on an allegation of ineffective assistance be conducted whenever there is a factual dispute. *People v. Ginther*, 390 Mich. 436;

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[27] Mich. Ct. R. 7.211(C)(1)(a)(ii) provides: "Within the time provided for filing the appellant's brief, the appellant may move to remand to the trial court. The motion must identify an issue sought to be reviewed on appeal and show: (i) that the issue is one that is of record and that must be initially decided by the trial court; or (ii) that development of a factual record is required for appellate consideration of the issue. A motion under this subrule must be supported by affidavit or offer of proof regarding the facts to be established at a hearing."

212 N.W.2d 922 (1973).[28] Contrary to his claim, Petitioner presents no cases which suggest or illustrate "significant confusion" in the lower courts regarding the legal standard which must be satisfied to trigger an evidentiary hearing. Petitioner further fails to allege, much less demonstrate, that the standard followed by Michigan differs from any other jurisdiction, how that standard violates the Constitution, or what standard should have been applied. The court of appeals found that even assuming Petitioner's factual allegations to be true he failed to demonstrate prejudice as required by *Strickland v Washington*, 466 U.S. 668; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984). Accordingly, the court properly refused to require an evidentiary hearing to be held. At best, Petitioner can only claim a misapplication of a properly stated rule of law. Certiorari is not warranted.

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[28]The standard can best be analogized to the central question under Fed. R. Civ P. 56(c): whether there is a genuine issue of material fact.

RELIEF REQUESTED

For the foregoing reasons, the People of the State of Michigan request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX 1

SUPREME COURT OF MICHIGAN

SC: 127184

[Filed May 31, 2005]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CRAIG MICHAEL HASKELL,
Defendant-Appellant.

On Appeal From
COA: 251929
Livingston CC: 02-013073

OPINION

On order of the Court, the application for leave to appeal the September 1, 2004 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX 2

COURT OF APPEALS, STATE OF MICHIGAN

Docket No. 251929

[Filed September 1, 2004]

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

CRAIG MICHAEL HASKELL,
Defendant-Appellant.

Janet T. Neff, Presiding Judge
Jane E. Markey, Michael R. Smolenski, Judges

ORDER

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1)(a) is DENIED for the failure to persuade the Court of the necessity of a remand at this time.

/s/_____
Presiding Judge

APPENDIX 3

RELEVANT STATUTORY PROVISION INVOLVED

Michigan Compiled Laws § 769.34 (2002)

(1) The sentencing guidelines promulgated by order of the Michigan supreme court shall not apply to felonies enumerated in part 2 of chapter XVII committed on or after January 1, 1999.

(2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. Both of the following apply to minimum sentences under this subsection:

> (a) If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the statute authorizes the sentencing judge to depart from that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a

departure under this section. If the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections and the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, authorizes the sentencing judge to impose a sentence that is less than that minimum sentence, imposing a sentence that exceeds the recommended sentence range but is less than the mandatory minimum sentence is not a departure under this section.

(b) The court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence.

(3) A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

(4) Intermediate sanctions shall be imposed under this chapter as follows:

(a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

(b) If the offense is a violation of section 7401(2)(a)(iv) or 7403(2)(a)(iv) of the public health code, 1978 PA 368, MCL 333.7401 and 333.7403, and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure.

(c) If an attempt to commit a felony designated in offense class H in part 2 of this chapter is punishable by imprisonment for more than 1 year, the court shall impose an intermediate sanction upon conviction of that offense absent a departure.

(d) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

(i) To imprisonment with a minimum term within that range.

(ii) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

(5) If a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty. This section does not apply to sentencing for that crime.

(6) As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

(7) If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.

(8) All of the following shall be part of the record filed for an appeal of a sentence under this section:

(a) An entire record of the sentencing proceedings.

(b) The presentence investigation report. Any portion of the presentence investigation report exempt from disclosure by law shall not be a public record.

(c) Any other reports or documents the sentencing court used in imposing sentence.

(9) An appeal of a sentence under this section does not stay execution of the sentence.

(10) If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

(11) If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

(12) Time served on the sentence appealed under this section is considered time served on any sentence imposed after remand.